SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

October Term, 1968.

No. 370

ELLIOT GOLDEN, as Acting District Attorney of the County of Kings,

Appellant,

against

SANFORD ZWICKLER,

Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK.

BRIEF FOR APPELLEE.

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Statutes Involved.

To the portion of the statute set forth in Brief for Appellant, the following section is added:

> "Section 458. Penalty.
>
> "Any person convicted of a misdemeanor under this article shall for a first offense be punished by imprisonment for not more than one year, or by a fine of not less than one hundred dollars nor more than five hundred dollars, or both such fine and imprisonment. *Any person convicted of a misdemeanor under this article for a second or subsequent offense shall be guilty of a felony.*" (Emphasis supplied.)

Questions Presented.

1. Is Section 457 of the Election Law of New York (formerly numbered Section 781-b of the Penal Law of New York) repugnant to the First Amendment to the Constitution of the United States in that it acts as an invalid restraint on expression?

2. Did not the District Court properly exercise its power to render a declaratory judgment in this case?

3. Did the District Court abuse its discretionary equitable powers by granting injunctive relief, incidental to its declaratory judgment?

Statement of the Case.

The appellee, Zwickler, commenced this action on April 22, 1966, for a declaratory judgment and injunction in the United States District Court for the Southern District of New York. He alleged that he had been previously convicted for a violation of Section 781-b of the Penal Law of New York, now renumbered as Section 457 of the Election Law of New York, in that he had distributed an anonymous leaflet in quantity, commenting upon a candidate for the Congress of the United States. Upon his appeal, his conviction was reversed because of the insufficiency of the evidence. Thereafter, the appellant as district attorney pursued the case to the Court of Appeals, the highest court in New York, which affirmed the reversal of the conviction, without opinion, *People v. Zwickler,* 16 N. Y. 2d 1069. The appellee, however, wishes to renew the distribution by him of the anonymous leaflet. But he was mindful of his previous conviction and his involvement in a prior prosecution all the way to the Court of Appeals.

Zwickler was also mindful that under the statute, a second conviction is a felony, with all its attendant disabilities in New York. He therefore fears to make distribution. He will not risk another prosecution and has thus been prevented from making distribution. Because of this fear he refrained from distribution during the 1966 election and while this litigation was pending. His interest in expressing himself is thus chilled by the perils and difficulties associated with such expression.

He also alleged that the appellant is a diligent prosecutor who had previously pursued him to the Court of Appeals and intends to again prosecute him and that because of the threats of prosecution of him, the appellee fears to exercise his right of expression by the distribution of the anonymous leaflet.

Zwickler alleges that he desires to distribute the leaflet in large quantities during the 1966 election (the complaint was filed in April, 1966) and subsequent election campaigns or in connection with the election of party officials, nominations for public office and party position that may occur *after* 1966.

He therefore prayed that the court declare Section 781-b to be repugnant to the Construction of the United States and to enjoin its enforcement.

The appellee moved for an interlocutory injunction and for the convening of a three-judge statutory court. The appellant moved to dismiss the complaint on the ground that it did not state a claim upon which relief could be granted.

The motion to convene a three-judge court was granted. It was convened and a hearing was held.

That court by a vote of 2-1 denied relief to the appellee and granted appellant's motion to dismiss the amended complaint. At the hearing counsel stipulated that the

court should treat the hearing as one for final judgment (A. 25). Indeed, the facts are matters of public record (*People v. Zwickler,* 16 N. Y. 2d 1069).

This court reversed the judgment of the District Court and remanded the case, *Zwickler v. Koota,* 389 U. S. 241.

Upon remand the District Court requested counsel to furnish additional briefs. No further hearings were held. It should be remembered in this connection that counsel had stipulated to treat the hearing for a preliminary injunction as one for a final judgment (A. 25).

The District Court by a unanimous vote, granted a final judgment (again attention to the stipulation of counsel as to finality is invited, A. 25 and which is recited in the judgment, A. 59), declaring the statute to be repugnant to the Constitution of the United States in that it abridges the rights secured to Zwickler under the First Amendment to the Supreme Court of the United States. The court also enjoined the district attorney from arresting or prosecuting the appellee under the statute.

Mr. Justice Harlan on July 8, 1968, granted an application made by the appellant for a stay over the objection of Zwickler that his First Amendment rights would be impaired if he could not make distribution during the election campaign of 1968.

Summary of Argument.

1. The appellee argues that the statute is repugnant to free speech protections of the Constitution in several respects:

(a) Since the record shows that the statute is directed against scurrilous and false campaign literature, appellee addresses his arguments in that light. The history of anonymous literature before the adoption of the Con-

stitution established its protection as part of the free expression protected by the Bill of Rights. Historical antecedents show that a tremendous amount of literature, both scurrilous and false, was written before the adoption of the Constitution. Indeed, even the Framers participated in anonymous writings before and after the adoption.

(b) This court has already held that speakers need not identify themselves. It follows, that writers have the same protection.

(c) Since the signature or non-signature is part of the manner of expression, the restrictions against the censorship of ideas apply, without any need for discovering a motivation for anonymity.

(d) If motivation is necessary, it can be found in the desire to escape reprisal, or for reducing resistance to novel ideas, or because of a prejudice against a certain writer or type of writer, or as in the case of *The Federalist*, the authors desired an objective appraisal. There are many others.

(e) The lack of a signature in itself is no evil. If there be an evil, it is only in the contents of the writing. The lack of a signature only provides an inconvenience for identifying the author, if identification is necessary.

(f) The contention of the appellant that it is necessary for effective administration of the election laws is far from the mark. The demonstration of a connection is most thin. Even if plausible, there is no justification for the denial of First Amendment rights to the public in general, merely to provide a check on election activity.

(g) In any event, the statute, as it reads, could be even used against literature that does have constitutional protection. It could apply, for example, to pamphlets that

treat constitutional propositions and thus draw within its ambit, such literature as *The Federalist.*

2. The appellee contends that the District Court was correct in its two decisions (the first, when it denied Zwickler relief, and the other upon remand) that a case and controversy exists between the parties. The appellee shows that the District Court is supported by the *Evers* case which decided a case and controversy existed under similar circumstances. The appellee also demonstrates that the recent *Carroll* case decided by this court is dispositive of any issue of mootness. In sum, since Zwickler has been discouraged from making distribution of anonymous leaflets (which he wishes to do in connection with an election or party function), because of the statute, the very existence of the statute is a chill upon his exercise of his right of expression. The existence of this desire and its frustration by the statute is a present and vital controversy.

3. The appellee also urges that the appellant has not shown any abuse of discretion by the District Court in granting injunctive relief, incidental to its declaration of the statute's invalidity. The appellee on the contrary, contends that such relief is desirable to render the judgment more efficient.

POINT I.

The statute is repugnant to the first amendment to the Constitution of the United States.

Preliminarily, appellee urges that the prevalence of a statute similar to New York's in 36 states, does not render this statute immune from attack as "the overwhelming public policy of the Nation". (Justice Clark dissenting in *Talley v. California,* 362 U. S. 60, page 70, questionable as

may be the observation that the public policy of the Nation is thus established, or whether the force of numbers withstands constitutional infirmity). In *Winters v. New York,* 333 U. S. 507, 520, in the dissenting opinion, the statute under attack was 60 years old and 20 states had similar statutes. See, *People v. Fenster,* 20 N. Y. 2d 309.

The appellee contends that anonymous publications directed at political figures and concerning political matters, had a long history of acceptance for centuries before the adoption of the Constitution. Indeed, even the Framers were active with anonymous political writings before and *after* the adoption of the Constitution. That alone is an indication that the constitutional protection of expression included anonymity. Moreover, even without such historical reference, anonymity of publication is as much protected as the speech itself. No government should have a right to interfere with a publication by commanding a signature no more than to command the style of writing or the paragraphing, no more than it could demand that a speaker on a platform cut off his whiskers so that he could be identified, undisguised. The lack of a signature is as part of the literary effort as any other part of it, since the author chooses to express himself in that fashion.

Since history shows that the political literature covered by the statute has over the centuries been attended with scurrility and untruthfulness, the statute proscribes what had been permitted before and after the adoption of the Constitution.

It should be noted that at the hearing before the District Court, the attorney general urged in an affidavit (A. 16) and argument, that the statute is not vague, because the history of the legislation shows that the statute's prohibitions are directed against untruthful or scurrilous campaign literature. Indeed, a trial court so construed the statute (*People v. LoPinto,* 1966, 49 Misc. 2d 997).

Analysis of the statute discloses that it is directed against anonymous pamphlets and leaflets when disseminated in connection with:

(1) any election of public officers

(2) party officials

(3) candidates for nomination for public office

(4) party position

(5) proposition or amendment to the state constitution; concerning the following:

(a) a political party

(b) candidates

(c) committee

(d) person

(e) proposition to the state constitution

(f) amendment to the state constitution.

A history of the legislation and its enforcement appears in the opinion of the District Court (A. 32).

The History Alone of Anonyma Shows That the First Amendment Protects It.

1. In *Roth v. United*, 354 U. S. 476 at 482-485, this court used historical antecedents to support the implication it drew, that obscene publications are an exception to the guarantees of the freedom of the press, although no words are found in the Constitution that state such an exception. The same method is conversely appropriate to demonstrate likewise that historically, anonymous political literature was the accepted mode of publishing and was used by the Framers themselves, both before and after the adoption of the Constitution.

The catalog of anonymous literature is a long one (see *Talley v. California,* 362 U. S. 60). An idea of its volume can be gained from the nine (9) thick volumes of Halkett & Laing, *Dictionary of Anonymous and Pseudonymous English Literature* (Oliver & Boyd, London 1926). Taylor & Mosher, *The Biographical History of Anonymous and Pseudonyma,* Chicago 1951, also contains several pages beginning at 280, listing numerous dictionaries and other guides to anonymous literature of countries all over the world; Bleyer, *Main Currents in the History of American Journalism;* 1 Encyclopedia Britannica (1968 edition) 1013.

See also, Stonehill, Charles A., *Anonyma and Pseudonyma,* 4 volumes (1927); Barbier, *Dictionnaire des Ouvrages Anonymes;* Force, *Who is Who;* Hayne, *Pseudonyms and Authors;* Partridge, *The Most Remarkable Echo in the World;* Solberg, *Authors of Anonymous Articles Indexed in Poole;* Wheeler, *An Explanatory and Pronouncing Dictionary of the Noted Names in Fiction, Including also Familiar Pseudonyma*; Cushing, *Anonyma.*

An example of the pre-Constitution anonymous writings is to be found in Bleyer, *op. cit.,* in which it is reported that the letters of Junius and the letters of Cato (1720) were anonymous scurrilous political tracts, Bleyer, pages 23, 79. The Stamp Act was opposed by anonymous literature, Bleyer, page 79.

One of the greatest satires on public officials and public life is *Gulliver's Travels.* It was issued originally as an anonymous document (Halkett & Laing, *op. cit.,* Volume 1, page 385) under the title, *"The Travels of Lemuel Gulliver,"* out of fear of the censorship laws of England, against which the First Amendment now stands as a bulwark, *Garrison v. Louisiana,* 379 U. S. 64 (see introduction by Shane Leslie to "The Travels of Lemuel Gulliver" by Jonathan Swift, The Limited Editions Club, 1929).

Paine, wrote his "Common Sense" anonymously (Halkett & Laing, *op. cit.*, 385). It was a powerful and scurrilous attack on political position at the time. Bleyer reports (p. 91): "This pamphlet more than any single piece of writing, crystallized in the popular mind the idea of independence for the colonies."

The reasons for anonymity were many. Taylor & Mosher, *op. cit.* 82 *et seq.* A prominent one was fear of reprisal. The forms of reprisals were many, including blacklisting. 1 Encyclopedia Britannica, *supra.*

Bleyer also reveals (Chaper II, Early Colonial Newspapers, 1690-1750), page 56, that James Franklin published a newspaper for which he sought anonymous writings:

> "To expose the Vices and Follies of Persons of all Ranks and Degrees under *feigned Names,* is that no honest Man will object against; and this the Publisher (by the Assistance of his Correspondents) is resolv'd to pursue, without Fear of, or Affection to any Man." (Emphasis supplied.)

His brother, Benjamin Franklin, contributed to it anonymously, Bleyer, page 56. Indeed, Franklin wrote under numerous pseudonyms, Ford, P. L.—*Franklin Bibliography,* Chap. IV; Taylor & Mosher, *op. cit.* 169.

After the Constitution, anonymous scurrilous writings continued even among the Framers. Hamilton attacked Jefferson. Bleyer, *op. cit.* (Chaper IV, Beginnings of the Political Press, pp. 100-129), page 110. Washington was also attacked, page 116.

Of course, *The Federalist,* which dealt with constitutional propositions, was anonymous or at least pseudonymous. Ford, *The Authorship of the Federalist,* American Historical Review, Vol. II, pp. 675, 443; Bancroft, History of the Forming of the Constitution of the United States, Vol. 2, p. 336.

Closer to our statute is the anonymous political literature Abraham Lincoln broadcast:

> "Two days before the August 7 election a handbill, *written but not signed* by Lincoln, was given out over the town. It recited a series of alleged facts about the ten acres claimed by Mrs. Anderson and an assignment of judgment by Anderson to Adams being freshly handwritten in what appeared to be the handwriting of Adams. In effect, Lincoln was publicly accusing Adams of being a forger and swindler, this without a trial, with no evidence heard from the accused, and witnesses cited from only one side. *It seemed Lincoln expected this handbill to blast Adams out of politics.* He guessed wrong. In the August 7 election Adams won by 1,025 votes against 792 for Henry." (Emphasis supplied.)
>
> Carl Sandburg, "Abraham Lincoln", page 61 (one-volume edition, Harcourt Brace & World Inc. 1954).

It is a common observation that new ideas are resisted because of their novelty. To succeed in winning support for them it is often necessary to introduce them anonymously. *The Federalist* is an excellent example of the use of pseudonyms to gain support for constitutional propositions, on objective grounds. The authors sought to have their propositions accepted, without overwhelming the population by their eminence.

2. So much for the historical support for the contention that the statute infringes upon free expression.

We turn to precedents in this court which support Zwickler's contentions:

We start with the question whether a person who wishes to communicate *with the public at large* on matters of general public interest, such as political candidates or constitutional propositions, must identify himself. To that question, this court has already given the answer

with respect to speakers. This court, in *Thomas v. Collins,* 323 U. S. 516, has held that a requirement that a speaker identify himself is an infringement on the right of expression. In that case, a speaker was held in contempt for having spoken without complying with a court order issued under a statute that required him first to register, so that he might be identified. This court struck down that law, saying:

> "As a matter of principle a requirement of registration in order to make a public speech would seem generally incompatible with an exercise of the rights of free speech and free assembly. Lawful public assemblies, involving no element of brave and immediate danger to an interest the State is entitled to protect, are not instruments of harm which require previous identification of the speakers. And the right either of workmen or of unions under these conditions to assemble and discuss their own affairs is as fully protected by the Constitution as the right of businessmen, farmers, educators, political party members or other to assemble and discuss their affairs and to enlist the support of others. If the exercise of the rights of free speech and free assembly cannot be made a crime, we do not think this can be accomplished by the device of requiring previous registration as a condition for exercising them and making such a condition the foundation for restraining in advance their exercise and for imposing a penalty for violating such a restraining order. So long as no more is involved then exercise of the rights of free speech and free assembly, it is immune to such a restriction. If one who solicits support for the cause of labor may be required to register as a condition to the exercise of his right to make a public speech, so may he who seeks to rally support for any social, business, religious or political cause. We think a requirement that one must register before he undertakes to make a public speech to enlist support for a lawful movement is quite incompatible with the requirements of the First Amendment."

Therefore, a speaker may rise on a platform without any identification, and even speak untruthfully or scurrilously. *Terminiello v. Chicago,* 337 U. S. 1. But the point is that he does not have to identify himself.

In which way could there be a distinction between an oral speaker and a written pamphlet? It had been urged that a speaker could be identified by his appearance. But if the speaker is a stranger from afar to the audience, or is disguised with whiskers and non-descript clothing, so that even his mother could not recognize him, as is so fashionable today among speakers, then the distinction completely evaporates, and the argument fails.

Basically, the entire concept of free speech rests on the assumption derived from centuries of scholarship and philosophy, that truth rests on its own supports for acceptance, and not on the name of its utterer. Holmes, J. in *Abrams v. United States,* 250 U. S. 616, Brandeis, J. in *Whitney v. California,* 274 U. S. 357, 375, Black, J. in *Adler v. Board of Education,* 342 U. S. 485, 496.

Justice Black in *Talley v. California,* 362 U. S. 60 at page 64, succinctly put it:

> "Anonymous pamphlets, leaflets, brochures and even books have played an important role in the progress of mankind. Persecuted groups and sects from time to time throughout history have been able to criticize oppressive practices and laws either anonymously or not at all. The obnoxious press licensing law of England, which was also enforced on the Colonies was due in part to the knowledge that exposure of the names of printers, writers and distributors would lessen the circulation of literature critical of the government. The old seditious libel cases in England show the lengths to which the government had to go to find out who was responsible for books that were obnoxious to the rulers. John Lilburne was whipped, pilloried and

fined for refusing to answer questions designed to get evidence to convict him or someone else for the secret distribution of books in England. Two Puritan Ministers, John Penry and John Udal, were sentenced to death on charges that they were responsible for writing, printing or publishing books. Before the Revolutionary War colonial patriots frequently had to conceal their authorship or distribution of literature that easily could have brought down on them prosecutions by English-controlled courts. Along about that time the Letters of Junius were written and the identity of their author is unknown to this day. Even the Federalist Papers, written in favor of the adoption of our Constitution, were published under fictitious names. It is plain that anonymity has sometimes been assumed for the most constructive purposes.

"We have recently had occasion to hold in two cases that there are times and circumstances when States may not compel members of groups engaged in the dissemination of ideas to be publicly identified. *Bates v. Little Rock*, 361 U. S. 516; *N. A. A. C. P. v. Albama*, 357 U. S. 449, 462. The reason for those holding was that identification and fear of reprisal might deter perfectly peaceful discussions of public matters of importance. This broad Los Angeles ordinance is subject to the same infirmity. We hold that it, like the Griffin, Georgia, ordinance, is void on its face."

See also, the concurring opinion of Justices Black and Douglas in *United States v. Rumely*, 345 U. S. 41, 56. In that case, Rumely was convicted of contempt of Congress for having refused to disclose to a congressional committee, the names of the purchasers of his books which he had on sale.

3. If an author were compelled to disclose his name in every case, it might deter him from publishing what may be of supreme importance to the public, especially, as in this case, concerning political candidates and political ideas. It is this deterrence which acts as a restraint on

ideas and thus violates the First Amendment. This, in addition to the argument of history, should answer any query (see Justice Clark dissenting in *Talley*, p. 70) as to where in the Constitution is to be found any edict against anonymous publications. The query can likewise be answered by *Roth, supra,* for there, obscenity was found to be unprotected by the Constitution, although the text did not state so. See *ante,* page 8.

Nor is it necessary that the distributor, as his burden, furnish proof of economic reprisal, loss of employment or physical danger. *It is sufficient that reprisal is inherent in restricting dissemination.* The potentiality of reprisal is not a matter of fact, to be proved in every case. It is a fact assumed by reason, to be a matter of law as a basis for permitting anonymity. See Justice Black in *Talley v. California,* 362 U. S. 60, 64:

> "There can be no doubt that such an identification requirement would tend to restrict freedom to distribute information and thereby freedom of expression. 'Liberty of circulating is as essential to that freedom as liberty of publishing; indeed, without the circulation, the publication would be of little value.' *Lovell v. Griffin,* 303 U. S. at 452."

What the First Amendment aims at is the chilling effect of the fear of dissemination that would result from a compelled disclosure.

See, *The Constitutional Right to Anonymity: Free Speech, Disclosure and The Devil,* 70 Yale Law Journal 1084, for a comprehensive discussion of the subject. See also, *Anonymity: An Emerging Fundamental Right,* 36 Indiana Law Journal 306.

There still remains to be discussed what the effect false anonymous and scurrilous statements would have on anonymous distribution. Although the history of anonyma shows that the Constitution protects such writings

even if they do not tend to restrict authorship, nevertheless, it is appropriate to consider such effect.

In the realm of speech, this court has been careful to protect the content of speech, even if the speech is obnoxious to the audience. *Lovell v. Griffin,* 303 U. S. 444; *Jameson v. Texas,* 318 U. S. 413; *West Virginia Board of Education v. Barnette,* 318 U. S. 624; *Kingsley International Pictures v. Board of Regent,* 360 U. S. 64; *Staub v. Baxley,* 355 U. S. 317; *Speiser v. Randall,* 357 U. S. 513.

This court in *Talley v. California,* 362 U. S. 60, held that a statute which forbade the dissemination of anonymous pamphlets was repugnant to the Constitution. There, the statute did not isolate the type of anonymous literature forbidden (see also, *People v. Mishkin,* 17 A. D. 2d 243, affd. 15 N. Y. 2d 671, and the subsequent amendment of the statute by the Laws of 1963, Chapter 703).

In *Talley*, a Los Angeles ordinance forbade distribution of handbills which did not have printed on their face the name and address of the printer and the person who caused distribution and sponsorship of the handbill. The defendant was arrested for violating the ordinance in that he had distributed a handbill of the National Consumers Mobilization which urged a boycott against certain businessmen who were named, because they carried products of manufacturers who would not offer equal employment to Negroes, Mexicans and Orientals. The Appellate Department of the Superior Court of the County of Los Angeles rejected defendant's contention that the ordinance invaded freedom of speech under the Fourteenth and First Amendments. This court held the ordinance unconstitutional, as too broad and in no way limited to pamphlets whose contents were obscene or offensive to public morals or advocated unlawful conduct.

This court held that the statute was not limited either by its text or legislative history to a means of identifying those responsible for fraud and libel. Therefore, it did not pass on the validity of an ordinance limited to prevent those evils. "The ordinance bars all handbills under all circumstances anywhere."

Here, the statute is more particularized. From the analysis (*ante*, p. 8), it is readily discernible that the subject matter of the statute is that most readily protected by the First Amendment. The subjects are candidates for public office, political parties and amendments to the state constitution. Of all discussions within the intendment of free speech, these are the most favored!

Yet, this statute is specific in condemning anonymous criticisim of persons of public interest, in a manner akin to seditious libel. As construed, the operation of the statute is to create a restraint which has the effect of a seditious libel statute.

In a recent series of cases, this court consistently followed and reaffirmed the principle, that disclosure cannot be compelled when reprisals or injury will likely result. *Bates v. Little Rock*, 361 U. S. 516, and *National Association for the Advancement of Colored People v. Alabama*, 357 U. S. 449, in which the court held that persons associated to disseminate ideas could not be compelled to identify the members; *Shelton v. Tucker*, 364 U. S. 479, where an individual teacher, as distinguished from the group in the *Bates* and *NAACP* cases, could not be required to identify organizations in which he was a member. *Lamont v. Postmaster General*, 381 U. S. 301, in which the Court struck the requirement that a recipient of a publication disclose himself.

4. The force of these decisions is not attenuated by older decisions, such as *Lewis Publishing Co. v. Morgan*, 229

U. S. 288, where disclosure was required for the exercise of the privilege of the use of second-class mail; and *United States v. Harriss,* 347 U. S. 612, requiring identification of lobbyists before Congress. These cases can be distinguished: the *Lewis* case in that the privilege might be renounced, as the price, though a heavy one, by one who sought anonymity. The periodical could resort to anonymity, without suppression, by government fiat, if it wished to pay the price. An entirely different case would arise if all anonymous mailings were barred. And it should not be overlooked that even periodicals enjoying second-class mail privileges, nevertheless, carry articles and letters that are anonymous. The *Harriss* case deals with a special situation relating to Congress. It does not compel disclosure to the public in general, but merely to members of Congress. In any event, if these cases cannot be so distinguished, it can be said they have been disregarded or overruled *sub silentio* by the subsequent decisions; see, e. g., *United States v. Rumely,* 345 U. S. 41.

5. In any event, the content of the literature (falsity and scurrility) is the evil, then argument to deal directly with that evil is appropriate. But such issue should not be befuddled with anonymity, which is only identification. Anonymity could only prove as a nuisance toward ascertaining the utterer, a nuisance akin to the task of an investigator in any case where identity is sought. But should such a nuisance weight sufficiently to abolish the right and benefits of anonymity that has been the history of literature from time immemorial? The District Court held the price to be too high (A. 49).

This court in *Schneider v. New Jersey,* 308 U. S. 147, had before it the question of the balancing of interests, when faced with the question whether distribution of pamphlets in the streets are to be free as against the

nuisance of the potential littering of the streets. This court voted in favor of eliminating restraints on speech as against the possible nuisance of the streets becoming littered.

In this connection it should not be overlooked that the use of pseudonyms and false names creates as much of a nuisance of attempted detection as does the complete absence of a name. So that the remedy sought by the statute (as appellee asserted, A. 16) as an instrument to locate an untruthful or scurrilous author is illusory.

The reports that the appellant annexed to his brief (pp. 40-71, App. A and App. B), serve only to make clear what has just been stated. Those reports are not in the record, nor as any part of appellant's proof. Undoubtedly, because the appellant believes they aid him they were inserted. The reports show however that such literature could be distributed, with or without a signature. The authorship of the pamphlets was readily admitted. Yet they were scurrilous. The reports also show that when identification of the source was sought, the results were obtained without much effort. What deserves emphasis however is, that although the source was identified, the scurrility nevertheless remained. What did identification achieve? Nothing, but satisfy a curiosity or a fierce resentment (Brief, p. 69). They also illustrate that scurrilous information is carried by word of mouth (Brief, p. 54) and that a speaker cannot readily be identified; nor is he subject to any statutory restriction. The same type of scurrility could readily be scrawled anonymously on walls.

As to any argument that it is necessary there be disclosure of literature distributed on the eve of an election, so that a candidate may be in a position to rebut, the answer is that the argument is confused. Dis-

closure of identity is not a necessary part of answering back. Anonymity has nothing to do with the ability of a candidate to answer back. The candidate could answer back whether the author of obnoxious material is disclosed or not. This contention is fortified by the decision in *Mills v. Alabama,* 384 U. S. 214, where the Court held unconstitutional, a statute which forbade comment on election day, if it urged people to vote in a particular manner.

Insofar as the recognized evil of fraud or palming-off is concerned, compelled disclosure is not the remedy. If, for example, a Democratic candidate should broadcast a leaflet falsely signed as by a Republican with the aim of injuring the Republican candidate, the remedy is not to require disclosure of the author. The remedy is by sanctions directly against the fraud. Punishment for anonymity provides no remedy for the supposed evil. If the aim of a statute is to eliminate that evil, it is far off target! A falsity can be stated with or without the name of the author affixed.

It is not amiss to observe that concern about the identity of a perpetrator of seditious libel or untrue statements has been considerably watered down by this court's recent pronouncements in *New York Times v. Sullivan,* 376 U. S. 254; *Garrison v. Louisiana,* 379 U. S. 64; *Time, Inc., v. Hill,* 385 U. S. 374; *Mills v. Alabama,* 384 U. S. 214. Those cases have limited the instances in which an action for a false, libelous or untrue statement may be brought; so that the practical operation of the New York statute as an instrument to aid libel actions, at best, is minimal. And if the minimal may be minimized, it should also be pointed out (as did the District Court, A. 41) that the laws of criminal libel were repealed in New York, effective September 1, 1967.

6. The statute under attack here, if adjudged valid with respect to false and scurrilous statements would only

serve to involve the courts in the dark labyrinths of determining the contents and character of a publication before it can approve anonymity.

But as the District Court put it so well, that before the judiciary makes a determination in a given case of permissible anonymity, the chilling effect on publication has already occurred. The courts in such a case would come into play only *after* a given event. There could be no determination of permissible anonymity before the publication. There could be no declaratory judgment of permissible anonymity, because the plaintiff in such a case would at some stage be revealed and therefore, the effect would be to discourage resort to such a remedy. But the chilling effect of the statute upon the author would remain.

This case furnishes an excellent illustration. Zwickler had previously been arrested and prosecuted through the New York courts, all the way to the New York Court of Appeals. To put it mildly, he became [illegible]ed in his enthusiasm about future distribution. Whether it can be said to be a "scurrilous" or "malicious" publication raises several serious questions, and since "malice" is so subjective, the problems multiply (see the concurring opinions of Justice Black and Justice Goldberg in the *New York Times* case as to the inherent difficulty of assessing "malice" of a publication). Whose malice is involved? Is it that of the anonymous author or of Zwickler, the distributor? Assuming the author had malice, but Zwickler was innocent and public-spirited, may the leaflet be distributed anonymously? How can Zwickler know, *in advance* of distribution whether he falls within the statute —or that the publication does? Under the circumstances, what is Zwickler to do about ascertaining his right to distribute anonymously? The answer is quite clear: he is discouraged and will not take the chance of distribution.

Zwickler's case undoubtedly is also the case of many others. There cannot be freedom to distribute if it is accompanied with fear. Therefore, the courts should not concern themselves with the question of whether the publication is true or false or scurrilous, as a price for publishing anonymously. Removal of the hazard of distribution is indispensable to freedom of the press.

The Statute is Invalid as to Literature That is Not Scurrilous or False.

Up to this point we have accepted the construction of the statute which appellant's counsel argued and supported with proof (A. 16). We submit, appellee has demonstrated that the statute as so construed is repugnant to the Constitution. It is invalid as to all anonymous political publications set forth in the statute.

It is clear that the statute is directed at political leaflets distributed in connection with certain events. The type of publication and the events are set forth with particularity in the statute. We submit, that the arguments appellee addressed to scurrilous and untrue publications, hold with even greater force with respect to the non-scurrilous and truthful types.* Those arguments produce the conclusion that the statute is *a fortiori* invalid, if for no other reason than that under a broad reading of

*The *Federalist*, for example, deals with constitutioual propositions. Had the statute under attack been in effect in the days of Hamilton and Jay, New York lawyers, serious difficulty would have been their lot, because of their multiple contributions to *The Federalist*, in pamphlet form, which they published anonymously under the title of "An Address to the People of the State of New York," 12 Encyclopedia Britannica, page 981, "John Jay." Under the statute, a second conviction is a felony, which to a lawyer means automatic disbarment (Judiciary Law, Section 88[3]).

the statute, even a highly laudatory publication would be proscribed.

The appellant contends that the purity is attained by enabling public officials to discover party expenditures. The District Court answered that theory (A. 41-42).

The District Court responded that the general public's right of expression is not to be impaired because the statute's purpose of gaining information about violators of expenditure provision. And the District Court quoted from *N.A.A.C.P. v. Alabama,* 357 U. S. 449, 461, in support of its conclusion (A. 45).

The appellant also is of the opinion that anonymity must be abolished because the public has "the right to know." What this "right to know" is, is difficult to discover. It is a phrase that has wide currency. But the source of its authority is not to be discovered. It is not a right found in the Constitution. The Constitution speaks only of a right of expression.

A "right to know" dangles in space, as one readily learns by asking, "the right to know *what?*" To answer, "the right to know the name of an author" begs the whole question. Therefore, the "right to know" cliché is not helpful.

The appellant's argument that a signature is necessary because people are emotional and are impressed by the printed word, the answer is that appellant takes a very pessimistic but unwarranted view of the electorate. It is a sad state for a democracy if its voters are as simple as appellant describes them. Fortunately, voters are not so naive nor as impressionable. Voters usually have their own mind. Some are impressed by what anonymous editors of newspapers suggest as their vote; others are impressed by non-anonymous figures. But on the whole, people vote as their sum total personality—a confluence of all forces—urges. See for example, the item about Abraham

Lincoln's anonymous effort to defeat a candidate and how unsuccessful it was (*ante*, p. 11).

The various positions taken by the appellant (Brief for Appellant, 16, 18, 21, 27) merely emphasizes the uncertainty of the grounds suggested in support of the statute. Appellant's contentions however can be reduced to a theory which holds: if a governmental purpose is served by a statute that impairs expression, then the statute is compatible with the Constitution. But such a theory overlooks two factors: First, that the decisions of this court, except in obscenity cases, completely negate such a contention; and secondly, that every attempt at state intrusion into speech seeks correction of an alleged evil in the cause of some public benefit. The District Court on this score, rejected the appellant's proffered justifications of the statute (A. 41-45).

POINT II.

A case and controversy exists; the District Court properly exercised its discretion to grant a declaratory judgment.

A final declaratory judgment in favor of Zwickler was granted by the District Court. Finality was reached because no disputed issues of fact appeared from the allegations in the complaint. Counsel for both sides had stipulated at the hearing of the application for a temporary injunction on June 9, 1966, that the court treat the application as one for final judgment. An excerpt from that hearing appears in the record (A. 25), which ends as follows:

> "Judge Kaufman: In other words, we are to consider this the hearing on the application for a permanent injunction.
> "Mr. Redfield: Yes, sir."

The District Court has at no stage doubted that a case or controversy exists between the parties. Even in its earlier decision, in which it abstained from exercising equitable jurisdiction, it held, 261 F. Supp. 985, 989:

> "The complaint states a claim under the Civil Rights Act, 28 U. S. C. §1343(4), since it alleges a deprivation of a right guaranteed by the Fourteenth Amendment. *It alleges a case or controversy which is within the adjudicatory power of this court. Douglas v. Jeanette,* 319 U. S. 157, 162, 63 S. Ct. 877, 880 (1943)." (Emphasis supplied.)

Upon remand, the District Court was again of the opinion that a case or controversy exists (A. 29-37). The court held that the chill upon Zwickler exercising his First Amendment rights is continuous. The statute has been used recently to prosecute persons including Zwickler, and the statute has been amended several times in recent years, thus demonstrating its viability.

That this appeal involves a case or controversy is readily deduced from a reading of *Evers v. Dwyer,* 358 U. S. 202. In that case, Evers attempted to sit in any empty seat of his choice in a segregated bus. He was told by the conductor to sit only in a seat designated for colored persons, as required by local ordinance. He was threatened with arrest for failure to comply. Instead of complying, he left the bus. He instituted an action to have the ordinance declared repugnant to the Constitution of the United States and for an injunction against its enforcement. Against a contention that no case or controversy existed, this court held that the facts did state a case and controversy, even in the face of a contention that the plaintiff had purposely prearranged his behavior for the very purpose of instigating a test case of the ordinance.

The District Court (A. 52, 33-37) disposed of appellant's attempt (Appellant's Brief, pp. 32-37), in the face of his stipulation that no facts are at issue, to smuggle a meaningless and unauthenticated circular into the record, to contend that Zwickler provoked his prosecution, and to impugn Zwickler's sincerity that he wishes to make distribution. Indeed, the *Evers* case makes all such speculation immaterial.

Zwickler's desire to distribute in the future is the same as Evers' desire to sit in the future in any vacant seat in a bus, without discrimination.

The fact that *Evers* was decided in the Fifth Circuit does not distinguish its force from the present case. Zwickler is stronger than *Evers* because Evers was not arrested, whereas Zwickler was arrested, arraigned, tried, convicted, won an appeal, and then was pursued by the defendant with an appeal to the highest court in the State.

Evers and Zwickler have a common core, which goes to the essence of the jurisdiction of the court upon an application for a declaratory judgment, and that is, that neither of them wished to be martyrs in order to assert their constitutional rights. Since the very purpose of an action for a declaratory judgment is to avoid perils, it is most appropriate when martyrdom would be the lot of one who disobeyed the penal law. And it is most appropriate where First Amendment rights are involved, as this court in this very case unanimously ordered.

Indeed, Borchard, the architect of the modern law of declaratory judgment states the following in his "Declaratory Judgments," Second Edition, at page 66:

> "Criminal Penalties. The danger of a criminal penalty attached by law to the performance of an act affords those affected the necessary legal interest in a judgment raising the issue of validity,

> immunity or status. The threat to enforce the law seems hardly necessary, for public officials are presumed to do their duty. The plaintiff need only show that his position is jeopardized by the statute * * *. He may challenge the statute before he commits the forbidden and incurs the penalty."

In the previous argument for the District Attorney in this court (see, Brief for Appellee, O. T. 1966, No. 81), it was not contended that no case or controversy is stated. It was argued only that the District Court was correct in abstaining under *Douglas v. Jeanette.* The defendant also argued that because the State of New York provides a remedy for a declaratory judgment, the District Court was correct in abstaining, citing *Bunis v. Conway,* 17 A. D. 2d 207, app. dism. 12 N. Y. 2d 882; *The Bookcase, Inc., v. Broderick,* 49 Misc. 2d 351, affirmed on the merits upon a direct appeal allowed under New York law where the sole issue is the validity of a statute under the Constitution, 18 N. Y. 2d 71; also *Fenster v. Leary,* 20 N. Y. 2d 309. Those cases hold that under New York law, declaratory judgment may be granted. This court stated however in this case that the plaintiff is not barred from relief in a federal District Court because of the concurrent remedy in the state court; that Congress had also provided for a remedy in the federal courts.

The citation for the District Attorney of those cases was not in vain, because they are helpful in demonstrating the exercise of jurisdiction in complaints seeking a declaratory judgment. *Bunis* and *Bookcase* were First Amendment cases. In *Bookcase,* the Court of Appeals held that the complaint stated a case for the exercise of jurisdiction. The complaint there, alleged as the present one, of plaintiff's prior prosecution and fear of subsequent sale of a certain book unless the court declared his right to sell same free from fears of prosecution

under the statute which the plaintiff claimed was repugnant to the Constitution. After the conviction of The Bookcase, Inc., there had been no threats or intimidation. It was only the plaintiff's fears after his prosecution, of the consequences of a subsequent sale that produced the cause of action.

It must be remembered that the New York courts have had substantial experience with declaratory judgments in relation to First Amendment claims. *Bunis* is one of them. The following language is as apt as it is helpful:

Page 210:

> "If relief by way of a declaratory judgment were not available, the chief of police, the district attorney or other local law enforcement authorities could impose an informal censorship merely by announcing that anyone selling a particular book would be prosecuted. Booksellers are naturally reluctant to incur the risk of criminal prosecution since that entails adverse publicity and physical and mental strain as well as expense, even though the prosecution should ultimately terminate in the dismissal of the charge. They may therefore refrain from selling the book denounced by the authorities and, in that event, no occasion for criminal prosecution ever arises. The mere threat of prosecution may thus have the effect of deterring or suppressing the sale of the book without any judicial determination ever being made as to whether the book is actually obscene. Such a system of informal censorship has been repeatedly condemned as a prior restraint by the action of governmental officials, in violation of the First and Fourteenth Amendments. * * *"

Page 211:

> "The use of declaratory judgment procedure is the most effective method of overcoming any attempt by local government officials to impose ex-

tralegal censorship. A bookseller, faced with a threat of prosecution if he sells a book condemned by the authorities, may escape from the dilemma by procuring, in an action for a declaratory judgment, a judicial determination as to the legality of the sale of the book, without first selling the book and incurring the risk of prosecution (see *DeVeau v. Braisted, supra,* 5 A. D. 2d 603, 607, 174 N. Y. S. 2d 596, 600, affd. 5 N. Y. 2d 236, 183 N. Y. S. 2d 793, 157 N. E. 2d 165, affd. 363 U. S. 144, 80 S. Ct. 1146, 4 L. Ed. 2d 1109)."

The threat in the *Bookcase* and *Bunis* cases is the threat that exists in this case—that the very existence of the statute restrains the exercise of First Amendment rights. There is no need for a prosecutor to verbalize. *Evers* is of like import. The District Court was of like opinion (A. 33).

What has happened since the District Court held in its first opinion that a case and controversy exists, that requires renewed argument on that score? Nothing. Other than the election of 1966 has passed and that Mr. Multer is no longer a Congressman, no new events have appeared.

(a) As to the passing of the date of the 1966 election: The complaint alleges that the plaintiff is not seeking to enforce his First Amendment right to be free from fear or the chill to distribute the pamphlet only with respect to the election of 1966, but in "subsequent election campaigns or in connection with any election of party officials, nomination for public office and party position that may occur subsequent to said election campaign.* Such distribution is intended to be made in quantities of more than a thousand copies of such anonymous leaflet" (Complaint, paragraph "Fourteenth"). It

*The complaint does not limit itself to this pamphlet but also, "similar anonymous leaflet."

cannot be expected that Zwickler should be put to commencing a new case just before each expected distribution. The likelihood is that the delays inherent in litigation would delay his exercise until after the occasion for distribution had passed. This inherent delay emphasizes that relief be afforded in this case.

Since as it is Zwickler's contention—a contention that the District Court upheld—that the chill upon plaintiff's right to make distribution authorizes the right of action—Zwickler should be afforded relief. Zwickler was prevented from making distribution during the 1966 election.

Zwickler was also prevented from distributing the leaflet at the election in 1968 by a reason of stay granted by Justice Harlan over opposition by Zwickler's counsel. If there is any one factor that points up the continued vitality of this litigation it is what was said and done in connection with the appellant's application dated June 27, 1968, for a stay. The appellant stated that it was urgent that the stay be granted in order to prevent anonymous literature from being distributed at the 1968 election. The appellee opposed the application because Zwickler would be prevented from exercising his First Amendment rights at the 1968 election. Justice Harlan by order dated July 8, 1968, nevertheless granted the application with a memorandum that the issue is substantial and there was absence of a showing that Zwickler intended to distribute the handbills (to the latter, the answer is that Zwickler's uncontroverted complaint alleged that he intended to continue making distribution of the handbill but has been discouraged by the fear of prosecution). The feature of the application that is conspicuous, is that a stay of this court against Zwickler's distribution had to be invoked to stop Zwickler. Could there be any doubt that the issue is vital?

Moreover, election of party officials, nominations for public office and party position regularly ensue. As we stated, Zwickler cannot wait until such events are announced and then be required to start an action, which will prove abortive for the purposes, because the event will have passed by the time a considered judicial determination is reached. This is all the more emphatic in this case, because the issue at stake would most probably find its way to this court for ultimate decision.

A recent case is dispositive of the issue of mootness. This court in *Carroll v. President and Commissioners of Princess Anne,* October Term, 1968, No. 6, decided November 19, 1968; U. S. ; 37 Law Week 4041, held in a case almost identical to this one on this issue, "that the continuing vitality of the petitioner's grievance, we cannot say that their case is moot." In that case the Commissioners obtained an *ex parte* injunction on August 7, 1966, against the holding of a meeting by proposed speakers. The injunction was to last for ten days thereafter. Almost two (2) years later after the injunction lapsed and the occasion for the meeting had gone, this court granted review, holding that the cause was not moot and is still a case and controversy, citing *Bus Employees v. Missouri,* 374 U. S. 74, 78, and *Walker v. Birmingham,* 388 U. S. 307 (1967).

In cases in New York courts where time had elapsed for the proposed exercise of First Amendment rights because of the attrition of litigation the courts have held that such passage of time does not render the question moot. In the latest case, *East Meadow Association v. Board of Education,* 18 N. Y. 2d 129, 135, the Court of Appeals of New York held that where a controversy is likely to be renewed between the parties, the issue does not become moot. In *Rockwell v. Morris,* 12 A. D. 2d 272, affd. 10 N. Y. 2d 721, cert. denied 363 U. S. 913, the time for which a permit to speak had passed; the court, nevertheless, granted relief for another date. See

also, *Matter of Febish v. New York State Lottery Control*, 32 Misc. 2d 561; *Matter of Rosenbluth v. Finkelstein*, 300 N. Y. 402.

(b) The fact that Mr. Multer is not a Congressman at present is of no consequence, in the light of this case. The pamphlet is a political tract. It is not a "Don't vote for Multer" leaflet. It does not depend upon the candidacy of the person mentioned in the pamphlet. It is a general campaign document. The plaintiff intends to distribute it *as a political tract* because of its significance to the political life of our time and to point out the incidents involved. Zwickler, according to the complaint intends to distribute similar anonymous tracts. The appellee urges the pamphlet does not necessarily have to be against Multer to render it as campaign material, but, as the complaint abundantly alleges (paragraph "Fourteenth"), that it will be used by Zwickler in any election campaign or in connection with any election of party officials, nomination for public office and party position that may occur subsequent to 1966. Since the events did occur in 1966, 1967 and 1968—and will reoccur—the exercise by plaintiff of his constitutional rights is being hampered now. This is a realistic view. An other view would be sheer pedantry. It cannot be expected that Zwickler should have to wait until the eve of one of the events to rush into court and claim that his right is being impaired. What with the delays of litigation, that right will not be determined. We have gone through that experience in this very case (A. 34-36). Since Zwickler feels that his right is chilled *now* his right to a remedy is now. The recent *Carroll* case, *supra*, supports this view.

In this respect, it is not amiss to point out that the author of the leaflet had an insight that subsequent events demonstrated to be correct, as the Israeli-Egyptian war in 1967 disclosed and the Soviet participation in that war on the side of Egypt.

Moreover, the complaint alleges (paragraph "Fifteenth") that Mr. Multer "has been a political figure * * * for many years last past" means that he could be a candidate for Congress again. It also means that the leaflet can be used in connection with any election of party officials or nomination for public office to demonstrate not only the record of the individual named, but also to show what the party permitted to be done and what the party's record is.

It is submitted that the plaintiff has shown that there is a controversy of sufficient substance to warrant the granting of relief by way of declaratory judgment, *Maryland Cas. Co. v. Pacific Coal and Oil Co.*, 312 U. S. 270. The hypothetical situation in *United Public Workers of America*, 330 U. S. 75, 89, does not exist here.

Zwickler has been chilled in the exercise of his First Amendment rights. He was prevented out of fear from exercising them in the 1966 election. The failure to grant him relief, will in effect prevent him from making distribution, for his complaint alleges that he does not intend to make a martyr of himself by risking the prosecution he previously was subjected to.

Nor should Zwickler be remitted to pursue a course of civil disobedience in order to test the validity of the law. Declaratory judgment is an ideal answer to those who assert that civil disobedience is the only method to obtain the ear of a court. To the public, which is sick and tired of pronouncements and stimulations of civil disobedience, especially of violence, the remedy of declaratory judgment should prove effective in reducing what has become a menace to public safety. The result however may diminish the ranks of those who seek martyrdom. But those so emotionally charged may find consolation in other avenues of glory. Zwickler's case shows the way to "an alternative to violence."

POINT III.

The appellant has not shown any abuse of discretion by the District Court in granting incidental injunctive relief.

Injunctive relief is granted or withheld in the exercise of the discretion of the court. Moore's Federal Practice, Rule 65.18(3); 57.10; 65.18(2). The appellant has not shown wherein the District Court abused its discretion.

On the contrary, the judgment is based on sound discretion. A declaratory judgment states the rights of the parties. It does not give the same or as efficient protection that an injunction does. Since Zwickler's emphatic claim has been that he fears to exercise his First Amendment rights because of a potential prosecution, security to him can come only with a judgment that will actually prevent and render void *ab initio,* any such prosecution.

CONCLUSION.

The judgment should be affirmed.

Dated, December, 1968.

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